No. 90-1290

FILED
MAY 8 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EDWARD F. BAGDON,

Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

PAUL W. SCHROEDER *
CHERYL L. URBANSKI
JONES, DAY, REAVIS & POGUE
225 West Washington Street
Suite 2600
Chicago, Illinois 60606
(312) 782-3939

Counsel for Respondent.
** Counsel of Record.*

QUESTIONS PRESENTED

1. Whether, when state law vests a cause of action in a corporation, the corporation is an indispensable party in a shareholder derivative action.

2. Whether the Court of Appeals correctly interpreted state law in holding that a minority shareholder must proceed derivatively on a claim for breach of fiduciary duty.

RULE 29.1 LIST OF AFFILIATED CORPORATIONS

The parent company of respondent Bridgestone/Firestone, Inc. is Bridgestone Corporation, a Japanese corporation. Bridgestone/Firestone, Inc.'s domestic subsidiaries (other than wholly owned subsidiaries) are Delta Holdings, Inc., Schottler Tire, Firestone Stores of Bay City, Inc., and Firestone Stores of Chicago-Ford, Inc. Its foreign subsidiaries are Hopewell International Insurance Ltd., a Bermuda corporation; United Insurance Co., a Bermuda corporation; Corporate Officers & Directors Assurance Holding Ltd., a Bermuda corporation; Corporate Officers & Directors Assurance Ltd., a Bermuda corporation; Bridgestone/Firestone Canada, Inc., a Canadian corporation; Firestone East Africa (1969) Limited, a Kenyan corporation; Liberian Bank for Development and Investment, a Liberian corporation; Lone Star Transport Lines, Inc., a Liberian corporation; Liberian Metal Processing Incorporated, a Liberian corporation; Bridgestone/Firestone de Mexico, S.A., a Mexican corporation; Firestone N.Z. Limited, a New Zealand corporation; and Philtread Tire & Rubber Corp., a Philippine corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LIST OF AFFILIATED CORPORATIONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

I. The Court Of Appeals Holding With Respect To Rule 19 Does Not Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals And Faithfully Applies This Court's Past Decisions. 5

II. This Court Should Not Grant Review To Decide Issues of State Law. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Abelow v. Symonds, 38 Del. Ch. 572, 156 A.2d 416 (1959) 11

City of Davenport v. Dows, 85 U.S. (18 Wall.) 626 (1873) 4,5,6,7

Elster v. American Airlines, 34 Del. Ch. 94, 100 A.2d 219 (1953) 10

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 9

Huddleston v. Dwyer, 322 U.S. 232 (1944) 9

Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947) 4-5,6

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 5,6

Ross v. Bernhard, 396 U.S. 531 (1970) 7

Taormina v. Taormina, 32 Del. Ch. 18, 78 A.2d 473 (1951) 11

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES, RULES AND OTHER AUTHORITIES

FED. R. CIV. P. 19 . . . . . *passim*

3A *Moore's Federal Practice*, para. 19.13[1], 19-224-226 8

3B *Moore's Federal Practice*, para. 23.1.21[1], 23.1-100 8

Stern, Gressman, Shapiro, *Supreme Court Practice* (6th ed. 1986) 10

28 U.S.C. § 1332(a) 3

7 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure: Civil 2d*, § 1601 (1986) 5,8

No. 90-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EDWARD F. BAGDON,

Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Bridgestone/Firestone, Inc. ("Firestone"), respectfully requests the Court to deny the petition for a writ of certiorari, filed on February 11, 1991, to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 17, 1990.

STATEMENT OF THE CASE

Petitioner, Edward Bagdon, and respondent, Bridgestone/Firestone, Inc.,[1] were the two stockholders in Firestone Stores of Chicago-Ford, Inc. ("Stores"), a Delaware close corporation. Petitioner owned 49 percent of the stock and respondent owned 51 percent. Stores operated a Firestone auto service store in the Ford City Shopping Center on the southwest side of Chicago. Petitioner managed the store and was an employee of respondent as well as co-owner of Stores. Stores was originally incorporated in Illinois, but, with petitioner's agreement, was reincorporated in Delaware in 1983. [2] (Pet. Appx. 2a.) It had its principal place of business in Illinois.

In the early 1980s, J.C. Penney, which also operated auto service stores, decided to exit the auto service business. In 1983, respondent bought or leased all of Penney's free-standing stores, including one in the Ford City Shopping Center (the "Penney store"). The Penney store was located at the other end of the Center about 700 yards from the Stores location. (Pet. Appx. 2a.)

In reliance on studies, information and recommendations received from its field personnel, Firestone management decided that Ford City could support two stores. On June 1, 1983, the Penney store began operations under the Firestone name. However, after the conversion of the Penney store, the economic situation at Ford City deteriorated and the business of both Ford City Firestone outlets declined. (Pet. Appx. 3a.)

---

1 Bridgestone/Firestone, Inc. was formerly known as Firestone Tire & Rubber Co.

2 All references herein which are designated by "Pet. Appx." refer to the Appendix filed with the Petition. All references designated by "Pet." refer to the Petition.

Four years later, in 1987, petitioner commenced a diversity action against the respondent in the United States District Court for the Northern District of Illinois. The only named defendant was respondent; petitioner did not join Stores as a party. Petitioner was a citizen of Illinois, and respondent was a citizen of Ohio. Naming Stores would have destroyed diversity because its principal place of business was in Illinois. *See* 28 U.S.C. § 1332(a). (Pet. Appx. 3a-4a.)

The Complaint asserted two causes of action purportedly based on petitioner's employment relationship with respondent (Counts II and III), and a cause of action (Count I) alleging that respondent as majority stockholder had breached its fiduciary duty to petitioner as minority stockholder by establishing the Penney store in competition with Stores. (Pet. Appx. 4a-5a.) Ultimately, the District Court directed a verdict for respondent on Counts II and III, and the petition concerns only Count I. (Pet. Appx. 5a.)

At the inception of the proceeding, on July 9, 1987, respondent moved to dismiss Count I of the Complaint on the ground that Stores was an indispensable party, required to be joined under Rule 19 of the Federal Rules of Civil Procedure. (Pet. Appx. 3a.) On October 8, 1987, the District Court denied the motion, finding that:

> Under Rule 19(b) the inquiry is "whether in equity and good conscience the action should proceed among the parties" or whether the absent person is indispensable, mandating dismissal of the action. Four factors must be considered: (1) the prejudicial effect of a

> judgment rendered in the absence of the party; (2) the extent to which such prejudice may be avoided; (3) the adequacy of the judgment in the party's absence; and (4) the availability of an adequate remedy if the action is dismissed. In this case, defendant has not shown that [Stores] is an indispensable party to this action under these four factors. [3]

(Pet. Appx. 18a; citation omitted.) After a jury trial, the District Court entered judgment for petitioner on Count I in the amount of $306,995.

On respondent's appeal, the Seventh Circuit reversed, holding that Stores was indeed an indispensable party to the action. Initially, the Court of Appeals looked to Rule 19, concluding:

> Rule 19 is *not* "applied pragmatically" in derivative cases. If this is a derivative suit, the corporation is an indispensable party. So much has been settled since *Davenport v. Dows*, 85 U.S. (18 Wall.) 626 (1873), a decision reaffirmed after the adoption of Rule 19. *Koster v. (American) Lumbermens*

---

3 In determining that the action could proceed without Stores, the District Court found that Stores would not be prejudiced because both of its shareholders were parties in the case, that an adequate judgment could be rendered in the absence of Stores since no other party would seek redress against defendant Firestone after the action was resolved and that, while the availability of the alternative Illinois forum renders a Rule 19(b) dismissal less onerous, the availability of an alternative remedy was not sufficient, standing alone, for deciding that the action should not proceed. (Pet. Appx. 18a-19a.)

Mutual Casualty Co., 330 U.S. 518, 522-23 n.2 (1947).

(Pet. Appx. 6a.) The Seventh Circuit then held as a matter of state law that the Illinois courts would apply Delaware law to determine whether a minority shareholder could maintain an individual action against the majority shareholder when it claims that the majority shareholder wrongly competed with the corporation, thereby depriving the minority shareholder of the benefits of its investment. Concluding that no such action could be maintained under Delaware law, and that the action could be maintained only by the corporation, the Court of Appeals held that Stores was an indispensable party. (Pet. Appx. 7a-11a.) This petition followed.

I. The Court Of Appeals Holding With Respect To Rule 19 Does Not Conflict With Of Any Decision Of This Court Or Of Any Other Court Of Appeals And Faithfully Applies This Court's Past Decisions.

Citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), and C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure: Civil 2d*, § 1601, p. 15 (1986), petitioner asserts an inconsistency between prior interpretations of Rule 19 of the Federal Rules of Civil Procedure and the Court of Appeals' ruling that corporations are indispensable parties in shareholder derivative actions. A review of these authorities shows no such inconsistency.

Petitioner argues that this Court's decision in *Provident Tradesmens Bank v. Patterson*, 390 U.S. 102

(1968), requires a "pragmatic" application of Federal Rule of Civil Procedure 19, and that the Court of Appeals' decision was not "pragmatic" because it did not contain a discussion of the "four overlapping factors" set forth in Section (b) of the Rule. (Pet. at 7, 11-13.) But *Provident Tradesmens Bank* was not a derivative action, and the language petitioner quotes from *Provident Tradesmens Bank* expressly recognized that "[t]he decision whether to dismiss (i.e., the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being . . . *compelling by themselves*." 390 U.S. at 118-19 (emphasis added). [4]

In this case, the derivative nature of petitioner's claim under state law was a "compelling factor" requiring dismissal. A shareholder's suit that is derivative under state law simply cannot be maintained without joinder of the corporation. *City of Davenport v. Dows*, 85 U.S. (18 Wall) 626 (1873); *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 n.2 (1947). As the Court noted in *Dows*:

> The relief asked [in a derivative action] is on behalf of the corporation, not the individual shareholder, and if it be granted[,] the complainant derives only an incidental benefit from it. . . . [A] court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the

---

4 Similarly, as the Committee Notes to the 1966 Amendments to Rule 19 observe, the factors listed in Rule 19(b) were never intended to "exclude considerations which may be applicable in particular situations."

> essential party in interest, unless it is made a party to the litigation.

85 U.S. at 627. Because the corporation in this case could not be joined without defeating the only basis for subject matter jurisdiction -- diversity of citizenship -- the Court of Appeals' decision was correct.

Petitioner suggests that the 1966 amendments to Rule 19 have somehow changed this Court's view of derivative suits. (Pet. at 8.) But while Committee Notes to the amended rule urge each court to consider the option of exercising "power to adjudicate as between the parties already before it," there has been no change in this Court's view, first expressed in *Dows*, that a corporation is the only real party in interest in a derivative suit:

> The corporation is a necessary party to [a derivative] action; without it the case cannot proceed. Although named a defendant, it is the real party in interest, the stockholder being at best the nominal plaintiff. The proceeds of the action belong to the corporation and it is bound by the result of the suit. The heart of the action is the corporate claim.

Ross v. Bernhard, 396 U.S. 531, 538-39 (1970). Thus, once it became clear that petitioner's Count I was entirely derivative and that the corporation could not be joined, the District Court lacked jurisdiction to adjudicate Count I.

Petitioner is similarly unsuccessful in relying on the *Federal Practice and Procedure* treatise to show conflict among the circuits regarding the necessity of joining a corporation in a derivative action. The general discussion of "pragmatism" cited by petitioner is followed by a specific discussion of the application of Rule 19 to shareholders' suits. 7 C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, § 1615, pp. 230-31 (1986). In the latter discussion, the authors note: "When [joinder] is not feasible, either because the corporation is not subject to service of process or its joinder would destroy diversity jurisdiction, the corporation has been regarded as an indispensable party and the action dismissed." No contrary authority is cited. *Moore's Federal Practice* says the same thing:

> In a derivative or secondary action by corporate stockholders against an outsider or the officers or directors of the corporation for wrongful injury to the corporation, *the corporation, if a going concern, is an indispensable party*, because the primary right sued on is that of the corporation, recovery normally accrues to it, and the stockholders are only secondarily interested.

3A *Moore's Federal Practice*, para. 19.13[1], 19-224-226 (emphasis supplied; footnote omitted). *See also* 3B *Moore's Federal Practice*, para. 23.1.21[1], 23.1-100 ("the corporation, if a going concern, must be made a defendant, since it is indispensable, even though the plaintiff sues upon a right which belongs to the corporation" (footnote omitted)). Again, no contrary authority is noted.

Petitioner has cited no cases or other authorities to the contrary. The decision below was fully consistent with the decisions of this Court and of the lower federal courts, and the law in this area is clear. [5]

II. The Court Should Not Grant Review To Decide Issues Of State Law.

Petitioner also urges this Court to grant certiorari to determine whether, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Seventh Circuit should have applied Illinois law rather than Delaware law, apparently assuming that, under Illinois law, Stores is not an indispensable party because Illinois allows a minority shareholder to sue the majority shareholder directly. (Pet. at 12-15.) As this Court noted in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." Indeed, in the 1980 revision of its rules, this Court "pointedly omitted a long-standing provision . . . that gave certiorari

---

5 Alternatively, petitioner argues that the Court of Appeals created a conflict among the circuits by applying a "de novo" standard of review instead of an "abuse of discretion" standard to the District Court's Rule 19 determination. (Pet. at 10-12.) Petitioner did not brief the standard of review to the Seventh Circuit, and the Court of Appeals accordingly did not even discuss the "de novo" and "abuse of discretion" standards. In any event, the Court of Appeals here concluded, correctly, that a corporation is an indispensable party as a matter of law in a shareholder's derivative action. The District Court thus committed reversible error in permitting trial on Count I to proceed, and the Court of Appeals properly expressed no opinion regarding the extent of the District Court's discretion in other contexts.

relevance to a court of appeals decision resolving 'an important state or territorial question in a way in conflict with applicable state or territorial law.' " Stern, Gressman, Shapiro, *Supreme Court Practice*, p. 212 (6th ed. 1986).

There is no reason to depart from that practice here. The petitioner has neither suggested nor demonstrated that the Court of Appeals would have reached a different result had it applied Illinois, rather than Delaware, law in determining whether a claim that the majority stockholder wrongly competed with the corporation is derivative. Moreover, the Court of Appeals expressly ruled that petitioner has waived any claim to the benefit of any state's law other than Delaware by his failure to brief the choice-of-law question issue in either the District Court or the Court of Appeals. (Pet. Appx. 8a.)

Given that the Court of Appeals properly applied the law of Delaware, there is no reason for this Court to grant review of the Court of Appeals' state law determination. The Seventh Circuit correctly interpreted Delaware law, and petitioner does not assert that its interpretation conflicts with any decision of this Court or of another federal appellate court. Consistent with the Seventh Circuit's analysis, *Elster v. American Airlines*, 34 Del. Ch. 94, 100 A.2d 219, 222 (1953), holds that while petitioner may proceed individually against wrongs which inflict a distinct and disproportionate, or "special," injury upon him, he must proceed derivatively where, as in his Count I for breach of fiduciary duty, "the wrong of which [he] complains is not a wrong inflicted upon him alone or a wrong affecting any particular right which he is asserting, . . . but is an indirect injury as a

result of the wrong done to the corporation." No exception to this general rule has been made for closely held corporations. *Abelow v. Symonds*, 38 Del. Ch. 572, 156 A.2d 415, 420 (1959) (a minority stockholder may bring an individual action to enforce common rights running against its own corporation or those dominating it, but must proceed derivatively to remedy wrongs to the corporation itself); *Taormina v. Taormina*, 32 Del. Ch. 18, 78 A.2d 473 (1951) (where action is brought to enforce a cause of action owned by the corporation, action is derivative in nature even though stockholders who are also alleged wrongdoers stand to benefit from it). Because petitioner sought to recover profits lost by Stores, he was required by Delaware law to proceed derivatively and to join Stores as an indispensable party.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL W. SCHROEDER *
CHERYL L. URBANSKI
JONES, DAY, REAVIS & POGUE
225 West Washington Street
Suite 2600
Chicago, Illinois 60606
(312) 782-3939

Counsel for Respondent.
** Counsel of Record.*